

ARTICLE 9. DEFAULT AND REMEDIES

9.01 Events of Default. Each of the following shall constitute an event of default ("Contractor Default") hereunder:

A. Contractor fails to perform any of its obligations under this Agreement, or any present or future supplement to this Agreement and fails to cure such breach (1) within thirty (30) days of receiving notice from City specifying the breach, provided that if the nature of the breach is such that it will reasonably require more than thirty (30) days to cure, Contractor shall not be in default so long as Contractor promptly commences the cure and diligently proceeds to completion of the cure; or (2) immediately, if the breach is such that the health, welfare or safety of the public is endangered thereby.

B. There is a seizure or attachment of, or levy on, the operating equipment of Contractor used at the Station, including without limitation, its vehicles, maintenance or office facilities, of such proportion as to substantially impair Contractor's ability to perform under this Agreement, and which is not released, bonded or otherwise lifted within two (2) business days.

C. There is any termination or suspension from any cause, including without limit, labor unrest including strike, work stoppage or slowdown, sickout, picketing, or other concerted job action of (a) the Contractor's ability to accept Solid Waste at the Station for more than two (2) days, or (b) its ability to operate Recycling Operations for more than fourteen (14) days.

D. Contractor files a voluntary case for debt relief under any applicable bankruptcy, insolvency, debtor relief, or other similar law now or hereafter in effect, or shall consent to the appointment of or taking of possession by a receiver, liquidator, assignee, trustee, custodian, sequestrator (or similar official) of Contractor for any part of Contractor's operating assets or any substantial part of Contractor's operating assets or any substantial part of Contractor's property, or shall make any general assignment for the benefit of Contractor's creditors, or shall fail generally to pay Contractor's debts as they become due or shall take any action in furtherance of any of the foregoing.

E. A court having jurisdiction enters a decree or order for relief in respect of the Agreement, in any involuntary case brought under any bankruptcy, insolvency, debtor relief, or similar law now or hereafter in effect, or Contractor consents to or fails to oppose any such proceeding, and such proceeding shall remain undismissed or unstayed for a period of ninety (90) days or any such court enters a decree or order appointing a receiver, liquidator, assignee, custodian, trustee, sequestrator (or similar official) of the Contractor or for any part of the Contractor's operating equipment or assets, or orders the winding up or liquidation of the affairs of the Contractor.

F. Contractor fails to furnish a replacement bond or a continuation certificate of the existing bond not less than sixty (60) days before expiration of the performance bond, as required by Section 7.03 of the Agreement or fails to maintain all required insurance coverages in force. The default shall occur immediately upon such failure without any necessity for notice from City of the breach and there shall be no opportunity to cure such breach. City shall have the right to give notice of termination under Section 9.02 immediately upon such default.

G. Contractor fails to provide reasonable assurance of performance required under Section 10.19.

H. A representation or warranty contained in Article 8 proves to be false or misleading in a material respect as of the date such representation or warranty was made.

9.02 Right to Suspend or Terminate Upon Default.

A. Upon any Contractor Default, City shall have the right to suspend or terminate this Agreement, in whole or in part. Such suspension or termination shall be effective thirty (30) days after City has given notice of suspension or termination to Contractor, except that such notice may be effective immediately if the Contractor Default is one which endangers the health, welfare or safety of the public. Notice may be given orally in person or by telephone to the representative of Contractor designated in or under Section 10.12 (or, if he/she is unavailable, to a responsible employee of Contractor) and shall be effective immediately. Written

confirmation of such oral notice of suspension or termination shall be sent by personal delivery, facsimile, or other expedited means of delivery to Contractor within twenty-four (24) hours of the oral notification. Contractor shall continue to perform the portion of the Agreement not suspended, in full conformity with its terms.

B. City will also have the right to suspend or terminate this Agreement, upon the same notice provisions, if Contractor's ability to perform is prevented or materially interfered with by a change in permit or law with which, under Sections 3.06 and 10.02 Contractor must comply, or by a cause which excuses nonperformance under Section 10.21, despite the fact that nonperformance in any of such cases is neither a breach nor default by Contractor.

9.03 Specific Performance. By virtue of the nature of this Agreement, the urgency of timely, continuous and high-quality service, the lead time required to effect alternative service, and the rights granted by City to Contractor, the remedy of damages for a breach hereof by Contractor is inadequate and City shall be entitled to injunctive relief.

9.04 Right to Perform. If this Agreement is suspended and/or terminated due to a Contractor Default, City shall have the right to perform and complete, by contract or otherwise, the work herein or such part thereof as it may deem necessary and to procure labor, equipment, and materials and incur all other expenses necessary for completion of the work, including, but not limited to, transportation of Municipal Solid Waste to the Disposal Facility. If such expenses exceed the amounts which would have been payable to Contractor under this Agreement if it had been fully performed by Contractor, then Contractor shall pay the amount of such excess to City.

9.05 City's Remedies Cumulative. City's right to cure breaches under Section 3.17, to suspend or terminate the Agreement under Section 9.02, to obtain specific performance under Section 9.03, and to perform under Section 9.04 are not exclusive, and City's exercise of one (1) such right shall not constitute an election of remedies. Instead, they shall be in addition to any and all other legal and equitable rights and remedies that the City may have, and including a legal action for damages, including incidental, consequential and/or special damages.

9.06 Liquidated Damages. The parties acknowledge (1) that consistent, efficient operation of the Station is of utmost importance, (2) that delays in operations which increase the costs of Participating Agencies' Designated Haulers will affect the payments that Participating Agencies must make to the Designated Hauler, and (3) that City has considered and relied on Contractor's representations as to its quality of service commitment in entering into this Agreement. The parties further recognize that quantified standards of performance are necessary and appropriate to ensure consistent and reliable service. The parties further recognize that if Contractor fails to achieve the performance standards, Participating Agencies and their residents will suffer damages and that it is and will be impracticable and extremely difficult to ascertain and determine the exact amount of damages that Participating Agencies will suffer. Therefore, the parties agree that the following liquidated damage amounts represent a reasonable estimate of the amount of such damages considering all of the circumstances existing on the date of this Agreement, including the relationship of the sums to the range of harm to Participating Agencies that reasonably could be anticipated and anticipation that proof of actual damages would be costly or inconvenient. In placing their initials at the places provided, each party specifically confirms the accuracy of the statements made above and the fact that each party had ample opportunity to consult with legal counsel and obtain an explanation of this liquidated damage provision at the time that this Agreement was made.

Contractor Initial Here: _____

City Initial Here: _____

Contractor agrees to pay (as liquidated damages and not as a penalty) the amount set forth below and further agrees that these amounts may be deducted by City from payments to Contractor by City:

- For each vehicle of Participating Agencies, and their Designated Haulers which is unable to depart from the Station within the fifteen (15) minute maximum turnaround time due to queuing within the Station. (Section 3.12)\$200
- For each vehicle of Participating Agencies and their Designated Haulers that is not processed through the scale house weighing operation in less than ninety (90) seconds. (Section 3.12)\$200

- For each failure to clean the Transfer Station floor,
as required in Exhibit J, Section 14.....\$1,000
- For each notice of violation received from the Local
Enforcement Agency or the California Integrated
Waste Management Board.\$1,000

Each of the above amounts will apply, for purposes of this Agreement, only to vehicles hauling Municipal Solid Waste from within a Participating Agency, including all vehicles of City, the other Participating Agencies, its or their Designated Haulers.

Each of the above amounts will be adjusted as of July 1, 2007 and as of July 1 annually thereafter by the same percentage that the Basic Annual Payment in Section 5.02 is adjusted.

Neither the time limits nor the liquidated damages set forth in this Section shall apply to vehicles selected for load check procedures pursuant to the HWEP or which are otherwise delayed because of the Contractor's investigations of their contents for hazardous waste nor to vehicles delayed by driver negligence, mechanical breakdown or other such cause which is beyond the control of, and not the fault of, the Contractor.

City's right to recover liquidated damages for Contractor's failure to meet the service performance standards shall not preclude City from obtaining equitable relief for persistent failures to meet such standards nor from terminating the Agreement for such persistent failures.

9.07 City Default. City shall be in default under this Agreement ("City Default") in the event City commits a material breach of the Agreement and fails to cure such breach within thirty (30) days after receiving notice from the Contractor specifying the breach, provided that if the nature of the breach is such that it will reasonably require more than thirty (30) days to cure, City shall not be in default so long as City promptly commences the cure and diligently proceeds to completion of the cure. City shall not be in default if a dispute arising under any Section for which arbitration is specified as the method of dispute resolution has been referred to arbitration until thirty (30) days after the arbitrator's final decision has been rendered.

In the event of a City Default, Contractor shall have all remedies available under California law for breach of contract; provided, however, that Contractor will continue to perform all of its obligations hereunder until a court of competent jurisdiction has issued a final judgment declaring that Contractor has the right to terminate this Agreement as a result of a City Default.

9.08 City's Right to Cure. In the event that Contractor fails to perform any of its obligations under Articles 3, 4, 5 or 6 and fails to perform such work within two (2) business days after notice from City, City may (but shall not be obligated to) enter the Station Site with necessary workers and equipment and perform the required work, or engage a third party contractor to do so. In such event, Contractor shall immediately upon demand reimburse City for all costs thereof, including any payments to a third party contractor, with interest after thirty (30) days at prime rate (as established by the Bank of America "reference rate") plus two percent (2%) but not in excess of the maximum interest rate allowed by law. If Contractor fails to make such reimbursement City may deduct the amounts due from subsequent payments to Contractor under Article 5.

9.09 Use of Property Upon Default. In the event of Contractor's Default, the City shall have the right to use any of Contractor's equipment, facilities and other property reasonably necessary for the provision of services hereunder. The City shall have the right to continue use of such property until other suitable arrangements can be made for the provision of such services, which may include the award of a contract to another service provider. If the City continues use thereof after the period of time for which Contractor has already been paid, Contractor shall be entitled to the reasonable rental value of such property, which shall be offset against the damages due the City as a result of Contractor's Default. Contractor agrees that it will fully cooperate with the City to effect the City's use of such property. The City may immediately engage all or any personnel necessary for the provision of services, including, if the City so desires, employees previously employed by Contractor. Contractor further agrees, if the City so requests, to assist the City in securing the services of any or all management or office personnel employed by Contractor whose skills are reasonably necessary for the continuation of services. Contractor agrees that the City's exercise of its rights under this section: (i) does not constitute a taking

of private property for which compensation must be paid; (ii) will not create any liability on the part of the City to Contractor other than the payment of reasonable rental value as provided for in this subsection; (iii) does not exempt Contractor from the indemnity provisions of Article 7 which are meant to extend to circumstances arising under this Section.

9.10 Damages. Contractor shall be liable to City for all direct and consequential damages arising out of Contractor's Default. This section is intended to be declarative of existing California law. The City may offset such damages against sums which would otherwise be due to Contractor.

ARTICLE 10. OTHER AGREEMENTS OF THE PARTIES

10.01 Relationship of Parties. The parties intend that Contractor shall perform the services required by this Agreement as an independent contractor engaged by City and not as an officer or employee of City nor as a partner of or joint venturer with City. No employee or agent of Contractor shall be deemed to be an employee of City, nor an agent of City except to the extent contemplated by Section 3.16. Except as expressly provided herein, Contractor shall have the exclusive control over the manner and means of conducting the services performed under this Agreement, and all persons performing such services. Contractor shall be solely responsible for the acts and omissions of its officers, employees, subcontractors and agents. Neither Contractor nor its officers, employees, subcontractors and agents shall obtain any rights to retirement benefits, workers' compensation benefits, or any other benefits which accrue to City employees by virtue of their employment with City.

10.02 Compliance with Law. In providing the services required under this Agreement, Contractor shall at all times comply with all applicable laws of the United States, the State of California and City, and with all applicable regulations promulgated by federal, state, regional or local administrative and regulatory agencies, now in force and as they may be enacted, issued or amended during the Term and all permits affecting the services to be provided, including but not limited to the Environmental Laws and the Americans with Disabilities Act, 42 U.S.C. 12101, et seq.

10.03 Governing Law. This Agreement shall be governed by, and construed and enforced in accordance with, the laws of the State of California.

10.04 Jurisdiction. Any lawsuits between the parties arising out of this Agreement shall be brought and concluded in the courts of the State of California, which shall have exclusive jurisdiction over such lawsuits. With respect to venue, the parties agree that this Agreement is made in and will be performed in Santa Clara County.

10.05 Assignment. Contractor acknowledges that this Agreement involves rendering a vital service to the City's residents and businesses, and that the City has selected Contractor to perform the services specified herein based on (i) Contractor's experience, skill and reputation for conducting its operations in a safe, effective and

responsible fashion, and (ii) Contractor's financial resources to maintain the required equipment and to support its indemnity obligations to the City under this Agreement. The City has relied on each of these factors, among others, in choosing Contractor to perform the services to be rendered by Contractor under this Agreement.

A. City Consent Required. Contractor shall not assign its rights or delegate or otherwise transfer its obligations under this Agreement to any other Person without the prior written consent of City. Any such assignment made without the consent of City shall be void and the attempted assignment shall constitute a breach of this Agreement.

B. Assignment Defined. For the purpose of this Section, "assignment" shall include, but not be limited to, (1) a sale, exchange or other transfer to a third party of substantially all of Contractor's assets dedicated to service under this Agreement; (ii) the issuance of new stock to or the sale, exchange or other transfer of thirty percent (30%) or more of the then outstanding common stock of Contractor to a Person other than the shareholders owning said stock at the date of this Agreement. [Modify in light of Contractor's corporate structure.]

C. Consent Requirements. If Contractor requests City's consideration of and consent to an assignment, City may deny or approve such request in its complete discretion. No request by Contractor for consent to an assignment need be considered by City unless and until Contractor has met the following requirements:

1. Contractor shall undertake to pay City its reasonable expenses for attorneys' fees and investigation costs necessary to investigate the suitability of any proposed assignee, and to review and finalize any documentation required as a condition for approving any such assignment;
2. Contractor shall furnish City with audited financial statements of the proposed assignee's operations for the immediately preceding three (3) operating years;
3. Contractor shall furnish City with satisfactory proof: (i) that the proposed assignee has at least ten (10) years of Municipal Solid Waste/Recycling

management experience on a scale equal to or exceeding the scale of operations conducted by Contractor; (ii) that in the last five (5) years, the proposed assignee has not been subject to any administrative or judicial proceedings initiated by any federal, state or local agency having jurisdiction over its Municipal Solid Waste/Recycling operations due to any significant failure to comply with state, federal or local laws and that the assignee has provided City with a complete list of such proceedings and their status; (iii) that the proposed assignee has at all times conducted its operations in an environmentally safe and conscientious fashion; (iv) that the proposed assignee conducts its Municipal Solid Waste management practices in accordance with sound waste management practices in full compliance with all federal, state and local laws regulating the collection and disposal of waste, including all Environmental Laws; (v) of any other information required by City to ensure the proposed assignee can fulfill the terms of this Agreement in a timely, safe and effective manner.

10.06 Subcontracting. Contractor shall not engage any subcontractors without the prior written consent of City. Contractor shall notify the City at least thirty (30) days prior to the date on which it proposes to enter into a subcontract. City may approve or deny any such request in its sole discretion.

Contractor may, in cases of emergency, engage subcontractors for up to seven (7) consecutive days. Contractor shall give prompt notice to City of any such emergency subcontracting and any such engagement must be approved by City in writing if it is to extend beyond seven (7) days, or if Contractor wishes to renew after an interval of less than thirty (30) days.

10.07 Binding on Successors. The provisions of this Agreement shall inure to the benefit of and be binding on the successors and permitted assigns of the parties.

10.08 Parties in Interest. Nothing in this Agreement, whether express or implied, is intended to confer any rights on any Persons other than the parties to it and their representatives, successors and permitted assigns, with the express exception of the Participating Agencies, which are third party beneficiaries of City's rights hereunder.

10.09 Waiver. The waiver by either party of any breach or violation of any provisions of this Agreement shall not be deemed to be a waiver of any breach or violation of any other provision nor of any subsequent breach or violation of the same or any other provision. The subsequent acceptance by either party of any monies that become due hereunder shall not be deemed to be a waiver of any pre-existing or concurrent breach or violation by the other party of any provision of this Agreement.

10.10 Contractor's Investigation; No Warranties by City. Contractor has made an independent investigation (satisfactory to it) of the conditions and circumstances surrounding the Agreement and the work to be performed by it, including the nature and amount of the Municipal Solid Waste generated within the City and the Participating Agencies and the recycling and source reduction programs now in effect in the City and other Participating Agencies. The Agreement accurately and fairly represents the intentions of Contractor, and Contractor enters into the Agreement on the basis of that independent investigation and analysis.

Contractor has carefully reviewed the information in the Request for Proposals and Addenda, if any. Contractor has had the opportunity to inspect the Station Site; the Station; the equipment installed in the Station; the environmental review documents (including the FEIR and the addendum thereto adopted in August 1992), as well as the permits governing its operation; the Source Reduction and Recycling Elements adopted by each of the Participating Agencies under the Act; the Disposal Agreement with Waste Management, Inc.; the collection agreements between each of the Participating Agencies and their respective Designated Haulers; and the plans for reconstructing the Municipal Solid Waste line.

While City believes that the information contained in the Request for Proposals is substantially correct, City makes no warranties in connection with this Agreement, including but not limited to the information contained in the Request for Proposals. The City expressly disclaims any warranties, either express or implied, as to the merchantability or fitness for any particular purpose of Municipal Solid Waste and Source-Separated Recyclable Materials delivered to the Station.

10.11 Condemnation. City reserves the rights to acquire the Contractor's property utilized in the performance of this Agreement through the exercise of the

right of eminent domain, in accordance with the procedure described in Section 1605 of the City Charter.

10.12 Notice. All notices, demands, requests, proposals, approvals, consents and other communications which this Agreement requires, authorizes or contemplates shall, except as provided in Section 9.02, be in writing and shall either be personally delivered to a representative of the parties at the address below or be deposited in the United States mail, first class postage prepaid (certified mail, return receipt requested), addressed as follows:

If to City: City Manager
456 West Olive Avenue
P.O. Box 3707
Sunnyvale, CA 94088-3707

with a copy to the Director of Public Works.

If to Contractor: _____

Attention: _____

Copies shall be sent to the other Participating Agencies, at addresses to be furnished by them from time to time. The address to which communications may be delivered may be changed from time to time by a notice given in accordance with this Section.

10.13 Representatives of the Parties.

A. Representatives of City. References in this Agreement to "City" shall mean the Sunnyvale City Council and all actions to be taken by City shall be taken by the City Council except as provided below. The City Council may delegate, in writing, authority to the City Manager, the Director of the Department of Public Works and/or to other City officials and may permit such officials, in turn, to delegate in writing some or all of such authority to subordinate officers. Contractor may rely upon actions taken by such delegates if they are within the scope of the authority properly delegated to them.

B. Representatives of Contractor. Contractor shall, by the Effective Date, designate in writing a responsible officer who shall serve as the

representative of Contractor in all matters related to the Agreement and shall inform City in writing of such designation and of any limitations upon his or her authority to bind Contractor. City may rely upon action taken by such designated representative as actions of Contractor unless they are outside the scope of the authority delegated to him/her by Contractor as communicated to City.

10.14 Duty of Contractor Not to Discriminate. Contractor shall not discriminate, nor permit any subcontractor to discriminate, in the employment of persons engaged in the performance of this Agreement or in the use of the Station on account of race, color, national origin, ancestry, religion, sex, age, physical handicap, medical condition, sexual orientation or marital status, in violation of any applicable federal or state law.

10.15 City Environmental Policies. Contractor and its subcontractors shall comply with City's Environmental Procurement Policy, the requirements of which are described in Exhibit V-1 and City's Integrated Pest Management Policy described in Exhibit V-2.

10.16 Right to Enter and Inspect Station. City shall have the right, but not the obligation, to observe and inspect all of the Contractor's operations under this Agreement. In connection therewith, City shall have the right to enter the Station during operating hours, speak to any of Contractor's employees and receive cooperation from such employees in response to inquiries. In addition, upon reasonable notice and without interference with Contractor's operations, City may review and copy any of Contractor's operational and business records related to this Agreement, including but not limited to utility bills and records of employee training. If City so requests, Contractor shall make specified personnel available to accompany City employees on inspections and shall provide electronic copies of records stored in electronic media.

10.17 Recycling Programs Not Restricted. Nothing in this Agreement shall restrict City or the other Participating Agencies, or any of them, as to their participation or non-participation, or the nature or extent of their participation in, any Recycling program, developed or operated by City, the other Participating Agencies, or

by one (1) or more residents, businesses, commercial, industrial or retail operators, or other persons, within their respective jurisdictions.

Notwithstanding the foregoing, the City agrees to deliver, or arrange for the delivery, to the Station of all Source-Separated Recyclable Materials which are collected from residences within the City and the City of Mountain View by employees of either city, by their respective Designated Haulers, or by other Persons operating a program of collecting Source-Separated Recyclable Materials from residences under a contract with the City or the City of Mountain View. The City does not, however, guarantee that it or the City of Mountain View will continue to operate such a program, nor does it guarantee that privately-sponsored residential recycling programs will not operate within either city or both cities.

10.18 Maintenance and Review of Records, Submission of Reports.

Contractor shall compile, on a daily basis, accurate records of its operations at the Station in sufficient detail to allow for accurate determinations of all matters that require periodic determination under this Agreement, including, but not limited to, Articles 3 through 6 hereof. City shall have the right during regular business hours to review and make copies of (at City's expense) any documents relevant to this Agreement, including, but not limited to, Contractor's payroll records, cash register records, scale records, videotape recordings of transactions at the scale house, and records maintained in electronic, magnetic and other media.

Contractor shall prepare and submit complete, accurate and timely reports on forms provided or approved by City, including those reporting forms attached as Exhibit O-1 through O-13 of this Agreement.

10.19 Right to Demand Assurances of Performance. If Contractor (1) "persistently" suffers the imposition of liquidated damages under Section 9.06; (2) is the subject of any labor unrest including work stoppage or slowdown, sickout, picketing or other concerted job action; (3) appears in the reasonable judgment of City to be unable to regularly pay its bills as they become due; or (4) is the subject of a civil or criminal proceeding brought by a federal, state, regional or local agency for violation of an Environmental Law, City may, at its option and in addition to all other remedies

it may have, demand from Contractor reasonable assurances of timely and proper performance of this Agreement, in such form and substance as the City may require.

10.20 Right of City to Make Changes. City may, without amending this Agreement, direct Contractor to cease performing one (1) or more types of service described in Articles 3 and 4, may direct Contractor to modify the scope of one (1) or more such services, may direct Contractor to perform additional solid waste processing services, or may otherwise direct Contractor to modify its performance under any other Section of this Agreement, including, by way of example, directing Contractor to deliver Municipal Solid Waste to a different disposal facility. Contractor shall promptly and cooperatively comply with such direction.

If such changes cause an increase or decrease in the cost of performing the services, an equitable adjustment in the Contractor's compensation shall be made. Contractor will continue to perform the new or changed service while the appropriate adjustment in the Contractor's compensation is being determined.

If City has directed a change in the scope of work under this Section and either party believes that such change will increase or decrease the costs of providing service, the party which believes the Contractor's compensation should be adjusted shall within thirty (30) calendar days submit to the other party a proposed adjustment and the parties shall thereafter meet and discuss the matter. Contractor shall promptly provide all relevant schedules, supporting documentation and other financial information requested by City to evaluate the necessity for an adjustment and the amount thereof. City's Director of Public Works shall participate in key meetings regarding those adjustments. Within ninety (90) days of the submission of the proposed adjustment, City will determine the amount of the adjustment, if any, and shall thereafter adjust the Contractor's compensation accordingly. Any adjustments will be made effective as of the date the change in service is implemented.

If the Contractor is dissatisfied with the decision of the City, any dispute shall be referred to and resolved by binding arbitration conducted pursuant to the procedures set forth in Exhibit R.

10.21 Force Majeure. Neither party shall be in default of its obligations under this Agreement in the event, and for so long as, it is impossible or extremely impracticable for it to perform its obligations due to an “act of God” (including, but not limited to, flood, earthquake or other catastrophic events), war, insurrection, riot, labor unrest of other than the party’s employees (including strike, work stoppage, slowdown, sick out, picketing, or other concerted job action), or other similar cause not the fault of, and beyond the reasonable control of, the party claiming excuse. A party claiming excuse under this Section must have taken reasonable precautions, if possible, to avoid being affected by the cause.

A. No Excuse from Performance. Neither Contractor nor the City shall be excused from the performance of its obligations under this Agreement except where a party’s failure to perform is due to an event of Force Majeure, as defined in this Agreement.

B. Obligation to Restore Ability to Perform. Any suspension of performance by a party pursuant to this Section shall be only to the extent, and for a period of no longer duration than, required by the nature of the event, and the party claiming excuse from obligation shall use its best efforts in an expeditious manner to remedy its inability to perform, and mitigate damages that may occur as result of the event.

C. Notice. The party claiming excuse shall deliver to the other party a written notice of intent to claim excuse from performance under this Agreement by reason of an event of Force Majeure. Notice required by this Section shall be given promptly in light of the circumstances, but in any event not later than five (5) days after the occurrence of the event of Force Majeure. Such notice shall describe in detail the event of Force Majeure claimed, the services impacted by the claimed event of Force Majeure, the expected length of time that the party expects to be prevented from performing, the steps which the party intends to take to restore its ability to perform, and such other information as the other party reasonably requests.

D. City’s Rights in the Event of Force Majeure. The partial or complete interruption or discontinuance of Contractor’s services caused by an event of Force Majeure shall not constitute an event of default under this Agreement.

Notwithstanding the foregoing: (i) the City shall have the right to make use of Contractor's facilities and equipment in accordance with Section 9.04 of this Agreement in the event of non-performance excused by Force Majeure; (ii) if Contractor's excuse from performance for reason of Force Majeure continues for a period of thirty (30) days or more, the City shall have the right, in its sole discretion, to immediately terminate this Contract; (iii) if Contractor is unable to collect and dispose of Municipal Solid Waste as required by this Contract for a period of three (3) or more consecutive days or for any (3) days in a seven (7)-day period as a result of Force Majeure, the City shall have the right to make use of Contractor's property in accordance with Section 9.04, and (iv) if Contractor's inability to collect and dispose of Municipal Solid Waste continues for fourteen (14) days or more from the date by which Contractor gave or should have given notice under Subsection C above, the City may terminate this Contract.

10.22 Cooperation During Transition. At the expiration or earlier termination of the Term, Contractor, at its own expense, shall cooperate fully with the City, as necessary, to ensure an orderly transition to any and all new service providers. In addition, during the last twelve months of the Term, Contractor shall allow prospective operators to observe operations at the Station.

10.23 Guaranty. Concurrently with its execution of this contract, Contractor shall furnish a Guaranty of its performance under this Agreement in the form of Exhibit W, properly executed by each of the parties whose names appear on Exhibit W.

10.24 Reports as Public Records. The reports, records and other information submitted (or required to be submitted) by Contractor to City are public records within the meaning of that term in the California Public Records Act, Government Code Section 6250 *et seq.* Unless a particular record is exempted from disclosure by the California Public Records Act, it must be disclosed to the public by the City upon request.

ARTICLE 11. MISCELLANEOUS AGREEMENTS

11.01 Exhibits. Each of the Exhibits, identified as Exhibits "A" through "____," is attached hereto and incorporated herein and made a part hereof by this reference.

11.02 Entire Agreement. This Agreement, including the Exhibits, represents the full and entire Agreement between the parties with respect to the matters covered herein and supersedes all prior negotiations and agreements, either written or oral.

11.03 Section Headings. The article headings and section headings in this Agreement are for convenience of reference only and are not intended to be used in the construction of this Agreement nor to alter or affect any of its provisions.

11.04 Interpretation. This Agreement shall be interpreted and construed reasonably and neither for nor against either party, regardless of the degree to which either party participated in its drafting.

11.05 Amendment. This Agreement may not be modified or amended in any respect except by a writing signed by the parties.

11.06 Severability. If any non-material provision of this Agreement is for any reason deemed to be invalid and unenforceable, the invalidity or unenforceability of such provision shall not affect any of the remaining provisions of this Agreement that shall be enforced as if such invalid or unenforceable provision had not been contained herein.

11.07 Attorneys' Fees. The prevailing party in any action brought to enforce the terms of this Agreement or arising out of this Agreement may recover its reasonable costs and attorneys' fees expended in connection with such an action from the other party.

11.08 References to Laws. All references in this Agreement to laws and regulations shall be understood to include such laws and regulations as they may be subsequently amended or recodified. In addition, references to specific governmental

agencies shall be understood to include agencies that succeed to or assume the functions they are currently performing.

IN WITNESS WHEREOF, City and Contractor have executed this Agreement as of the day and year first above written.

ATTEST:

CITY OF SUNNYVALE ("City")

CITY CLERK

By: _____
Deputy City Clerk

By: _____
City Manager

By: _____
APPROVED AS TO FORM

CONTRACTOR (NAME)

By: _____
Title

By: _____
Title

LIST OF EXHIBITS

Exhibit A	Definitions
Exhibit B-1	Materials Recovery Operations Plan
Exhibit B-2	Materials Flow Diagram
Exhibit B-3	Food Waste Processing Plan and Pricing
Exhibit C	MSW Processing Lines Design Drawings
Exhibit D	Permits Necessary for Operation of Station
Exhibit E	Terms and Conditions in Use Permit Issued by City for Station
Exhibit F	Adopted Mitigation Measures in FEIR
Exhibit G	Hazardous Waste Exclusion Program
Exhibit H-1	Equipment to be Furnished by City
Exhibit H-2	Equipment to be Furnished by Contractor
Exhibit I-1	Minimum Staff Complement for Station
Exhibit I-2	Prevailing Wage Determination Letter
Exhibit I-3	Benefit Monetization Procedure
Exhibit J	Operating Procedures and Standards
Exhibit K	Source-Separated Recyclables Composition Survey Protocols
Exhibit L	SMART Radiation Monitoring SOP
Exhibit M	Volume-to-Weight Conversion Factors
Exhibit N-1	Procedure for Adjustment to Monthly Invoices for Publicly Hauled Waste Disposal Fees and Facility Use Fees
Exhibit O-1 - 13	Reporting Forms
Exhibit O-14	Minimum Software Capabilities
Exhibit P	Allocation of Revenues from Sale of Recycled Materials
Exhibit Q	Form of Performance Bond
Exhibit Q-1	Form of Continuation Certificate
Exhibit R	Procedures for Arbitration
Exhibit S	Method for Calculating Recycling Percentage
Exhibit T	Waste Characterization Protocols
Exhibit U	Plan of Office Building
Exhibit V-1	Environmental Procurement Policy
Exhibit V-2	Integrated Pest Control Policy
Exhibit W	Guaranty

EXHIBIT A

DEFINITIONS

1. **Agreement.** "Agreement" means this Agreement between City and Contractor for the Operation of the Sunnyvale Materials Recovery and Transfer Station dated as of _____, 200__, including all exhibits and attachments, and any amendments hereto.

2. **Ash.** "Ash" means the material remaining after incineration of Municipal Solid Waste, including bottom ash and fly ash. "Ash" does not include ashes from residential burning, such as fireplaces, barbecues, etc.

3. **Bulky Waste.** "Bulky Waste" means stoves, refrigerators, other white goods, furniture and other similar waste materials with weights or volumes greater than those allowed in waste collection cans.

4. **City.** "City" means the City of Sunnyvale, a municipal corporation, and all of the territory lying within its municipal boundaries as presently existing or as such boundaries may be modified during the Term, as well as unincorporated areas completely surrounded by City which are provided solid waste collection services by City or by a company or companies which from time to time is granted the exclusive right to franchise to collect Municipal Solid Waste for City.

5. **Construction Debris.** "Construction Debris" means waste building materials resulting from construction, remodeling, repair or demolition operations.

6. **Contractor.** "Contractor" means
_____, a
_____.

7. **Designated Hauler.** "Designated Hauler" means the company or companies which from time to time are granted the exclusive right or franchise to collect Municipal Solid Waste within the Participating Agencies and deliver it to the Station.

8. **Designated Waste.** "Designated Waste" means those substances classified as designated waste by the State of California, presently in 23 California Code of Regulations Section 2522.

9. **Disposal Contract.** "Disposal Contract" means the Agreement for Long Term Disposal of Solid Waste between the City and Waste Management of California, Inc., dated as of September 10, 1991. For purposes of Section 3.08 of this Agreement, the term Disposal Contract also includes the Mountain View-Waste Management Disposal Contract dated as of September 24, 1991, and the Palo Alto-Waste Management Disposal Contract dated as of October 7, 1991.

10. Disposal Facility. "Disposal Facility" means the Kirby Canyon Recycling and Disposal Facility located east of U.S. Highway 101 in San Jose, California.

11. Disposal Fee. "Disposal Fee" means the amount payable by the Participating Agencies to Waste Management of California, Inc. (or whatever company owns and/or operates the Disposal Facility) for Municipal Solid Waste delivered to the Disposal Facility pursuant to the Disposal Contract and the Neighboring Cities' Disposal Contracts, including taxes and governmental fees.

12. Effective Date. "Effective Date" has the meaning set forth in Section 2.01 of the Agreement.

13. Environmental Laws. "Environmental Laws" means all federal and state statutes, county and city ordinances concerning public health, safety and the environment including, by way of example and not limitation, the Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. Section 9601 *et seq.*; the Resource Conservation and Recovery Act, 42 U.S.C. Section 6901 *et seq.*; the Federal Clean Air Act, 42 U.S.C. Section 7401 *et seq.*; the Federal Clean Water Act, 33 U.S.C. Section 1251 *et seq.*; the Emergency Planning and Community Right to Know Act, 42 U.S.C. Section 11001 *et seq.*; the Occupational Safety and Health Act, 29 U.S.C. Section 651 *et seq.*; the California Integrated Waste Management Act, California Public Resources Code Section 40000 *et seq.*; the California Hazardous Waste Control Act, California Health and Safety Code Section 25100 *et seq.*; the California Toxic Substances Account Act, California Health and Safety Code Section 25300 *et seq.*; the Porter-Cologne Water Quality Control Act, California Water Code Section 13000 *et seq.*; the Safe Drinking Water and Toxic Enforcement Act, California Health and Safety Code Section 25249.5 *et seq.*; the California Clean Air Act, Health and Safety Code Sections 39000 *et seq.*; the California Hazardous Materials Response Plan and Inventory Act, Health and Safety Code Sections 25500 *et seq.*, as currently in force or as hereafter amended, and all rules and regulations promulgated thereunder.

14. Extended Service Area. "Extended Service Area" means any area in Santa Clara County, outside the Primary Service Area, from which the City authorizes the Contractor to accept Municipal Solid Waste and/or Recyclable Materials at the Station.

15. FEIR. "FEIR" means the Final Environmental Impact Report entitled "Sunnyvale Materials Recovery and Transfer Station Environmental Impact Report" certified by the Sunnyvale City Council on September 25, 1990, including the Draft Environmental Impact Report dated June 18, 1990 and the Final Environmental Impact Report dated September 14, 1990.

16. Garbage. "Garbage" means putrescible animal, fish, food, fowl, fruit or vegetable matter, or any product thereof, resulting from the preparation, storage, handling or consumption of such substances.

17. Gate Fee. "Gate Fee" means the amount (initially \$5.50 per cubic yard) which Contractor is entitled to collect from users of the Station delivering Publicly Hauled Waste, and to retain. It is a component of the Public Use Fee.

18. Hazardous Waste. "Hazardous Waste" means:

i. all substances defined or characterized as hazardous waste by the Federal Solid Waste Disposal Act (42 U.S.C. Section 3251 *et seq.*), as amended, including the Resource Conservation and Recovery Act (42 U.S.C. Section 6901 *et seq.*) and all future amendments thereto or regulations promulgated thereunder;

ii. all substances defined as hazardous waste, acutely hazardous waste, or extremely hazardous waste by Health and Safety Code Sections 25110.02, 25115, and 25117, and future amendments to or recodifications of such statutes or regulations promulgated thereunder, including 23 California Code of Regulations Sections 2521 and 2522; and

iii. radioactive wastes.

If two or more governmental agencies having concurrent or overlapping jurisdiction over hazardous waste adopt conflicting definitions of "hazardous waste," for purposes of processing and disposal to land, the broader, more restrictive definition shall be employed for purposes of this Agreement.

19. Host Fee. "Host Fee" means the amount which City is entitled to receive for Municipal Solid Waste delivered to the Station from the other Participating Agencies, for Publicly Hauled Waste, and for any materials from outside the Primary Service Area. Contractor is to collect the Host Fee, as a component of the Public Use Fee or Outside User Fee, and remit it to City.

20. Maintenance Waste. "Maintenance Waste" means the following materials collected by maintenance employees of a Participating Agency or by private contractors hired by a Participating Agency:

i. debris from street and sewer repairs;

ii. debris from street sweepings;

iii. grass clippings, leaves and tree trimmings from maintenance of parks, streets, median strips and other city property;

iv. rock and concrete;

v. concrete and asphalt pavement from streets; and

vi. tree stumps.

21. Medical Waste. "Medical Waste" means those materials defined in Health and Safety Code Section 25023.2 and does not include waste identified as not being medical wastes in Section 25023.8.

22. Memorandum of Understanding. "Memorandum of Understanding" means the Second Memorandum of Understanding Among the Cities of Mountain View, Palo Alto and Sunnyvale Relating to the Construction and Operation of a Materials Recovery and Transfer Station and the Long Term Disposal of Municipal Solid Waste at Kirby Canyon made as of June 9, 1992.

23. Minimum Recycling Level. The percentage shown in Section 3.05.B which Contractor is obligated to Recycle.

24. Municipal Solid Waste. "Municipal Solid Waste" means all substances or materials that are discarded or rejected as being spent, useless, worthless or in excess of the owner's needs at the time of discard or rejection including, without limitation, all putrescible and non-putrescible solid and semi-solid waste including Garbage, Rubbish, Maintenance Waste, Yard Waste, Bulky Wastes, industrial wastes, Construction Debris, and grit and sweepings from a Water Pollution Control Plant, which are generated by residential, commercial, industrial, institutional, municipal, agricultural and other activities and which are not otherwise restricted in a Class III landfill by State or Federal regulations and which are delivered to the Station.

Municipal Solid Waste does not include: (i) Hazardous Waste; (ii) Designated Waste; (iii) Medical Waste; (iv) Ash; (v) Source-Separated Yard Trimmings; (vi) Source-Separated Recyclable Materials; or (vii) materials segregated for processing and recycling at the Transfer Station once they have been so segregated and processed.

25. Neighboring Cities. "Neighboring Cities" means the cities of Mountain View and Palo Alto.

26. Neighboring Cities' Disposal Contracts. "Neighboring Cities Disposal Contracts" means the Agreements for Long Term Disposal of Solid Waste between Mountain View and Waste Management of California, Inc., dated as of September 24, 1991, and the Agreement for Long Term Disposal of Solid Waste between Palo Alto and Waste Management of California, Inc., dated as of October 7, 1991.

27. Outside User Fees. "Outside User Fees" means the amounts established by City which Contractor is to collect from users of the Station from outside the Primary Service Area, and to remit to City.

28. Participating Agencies. "Participating Agencies" means the three cities of Palo Alto, Mountain View and Sunnyvale, or any of them, as the context requires.

29. Person. "Person" includes any individual, firm, association, organization, partnership, corporation, business trust, joint venture, the United States, the State of California, the County of Santa Clara, municipality or special purpose district or any other entity whatsoever.

30. Primary Service Area. "Primary Service Area" means the geographical area within the jurisdiction of the Participating Agencies and any contiguous areas which are served by the Designated Hauler(s) of one or more Participating Agencies.

31. Processing. "Processing" means the reduction, separation, recovery, conversion or recycling of solid waste.

32. Proposal. "Proposal" means the Proposal dated _____, submitted by Contractor to City under cover of a letter dated _____, including all attachments and exhibits (i.e., Proposal Forms ____ through ____).

33. Public Use Fee. "Public Use Fee" means amounts established by City to be charged to persons delivering Publicly Hauled Waste to the Station.

34. Publicly Hauled Waste. "Publicly Hauled Waste" and "Publicly Hauled Municipal Solid Waste" mean Municipal Solid Waste delivered to the Station by persons other than the Participating Agencies and/or their Designated Haulers.

35. Recyclable Materials. "Recyclable Materials" means any materials pulled out of the waste stream, including domestic, commercial or industrial by-products of some potential value which are set aside, handled, packaged or offered for collection in a manner different from Garbage, Rubbish or other forms of Municipal Solid Waste.

36. Recycle; Recycling. "Recycle" or "Recycling" means the process of collecting, sorting, cleaning, treating and reconstituting materials and returning them to the economic mainstream in the form of raw material for new, reused or reconstructed products which meet the quality standards necessary to be used in the marketplace. "Recycle" or "Recycling" does not include Transformation, except for the Transformation of wood (but not wood by-products, such as paper) to produce fuel.

37. Recycling Level. "Recycling Level" means the percentage of the Municipal Solid Waste (including Publicly Hauled Waste) entering the Station which is diverted from land disposal by Contractor's operations and thereafter recycled. The Recycling Level will be calculated as shown on Exhibit S.

38. Rubbish. "Rubbish" means all waste wood, wood products, printed materials, paper, pasteboard, rags, straw, used and discarded clothing, packaging materials, ashes from residential burning, floor sweepings, glass, and other waste materials not included in the definition of Garbage, Hazardous Waste, or Yard Waste.

39. Sharps. "Sharps" means sharp-edged or pointed medical implements, such as needles, lancets, etc.

40. Source-Separated Recyclable Materials. “Source-Separated Recyclable Materials” means Recyclable Materials which have been segregated into separate containers by the Waste Generator, the Designated Hauler or other Persons prior to their delivery to the Station. Materials delivered to the Buyback/Dropoff Center and materials collected by the Participating Agencies’ Designated Haulers as part of “curbside” recycling programs are included in Source-Separated Recyclable Materials.

41. Station. “Station” means the facility owned by the City which is utilized to receive Municipal Solid Waste, to temporarily store, separate, recover, convert or otherwise process the materials comprising the Municipal Solid Waste, to Recycle materials from the Municipal Solid Waste and to transfer the remaining Municipal Solid Waste to Transfer Vehicles for transport to the Disposal Facility.

42. Station Site. “Station Site” means the area (approximately 9 acres) on which the Station and appurtenances are located.

43. Term. “Term” has the meaning set forth in Section 2.02 of the Agreement.

44. Ton. “Ton” means a short ton of 2,000 pounds avoirdupois.

45. Transfer Vehicle. A tractor and trailer designed to haul a load of no less than 20 Tons of solid waste.

46. Transferee Municipality. “Transferee Municipality” means any municipal corporation to which City, or any of the other Participating Agencies, has transferred a portion of its Allocation Quantity in accordance with Section 3.04 of the Disposal Contract or Neighboring Cities’ Disposal Contracts.

47. Transformation. “Transformation” means the incineration, pyrolysis, distillation, gasification, or biological conversion other than composting.

48. Yard Trimmings. “Yard Trimmings” means tree trimmings, grass cuttings, dead plants, leaves, branches and dead trees, and similar organic materials. Yard Trimmings may be Source-Separated Recyclable Materials if they are segregated prior to collection and delivered to the Station in a separated condition. They may also constitute Municipal Solid Waste if they are delivered commingled with other waste materials.